IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-1511

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SUPREME COURT, U.S.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

V.

EVELYN ELLIOTT AND BENITO MOLINA, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EUDCATION, AND WELFARE, ET AL., PETITIONERS

V.

FANNIE BUFFINGTON AND FRANCES BINER, ET AL.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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2. Whether the district courts had jurisdiction to certify these actions as class actions and to issue classwide relief to all social security recipients who are affected by the challenged overpayment recoupment procedures.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part that "no person shall be ... deprived of ... property, without due process of law ...," while Section 204(b), 42 U.S.C. 404(b) mandates, in pertinent part, that "... there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." (See the Secretary's petition at 155A-156A for the full text of 42 U.S.C. § 204(a) and (b).)

The Secretary has issued regulations to define "without fault" (20 C.F.R. § 404.507), "defeat the purposes of this subchapter" (20 C.F.R. § 404.508), and "against equity and good conscience" (20 C.F.R. § 404.509). Those regulations are set forth in full in Appendix D of this response.

Other applicable regulations are set forth in the Secretary's petition at 145A-155A, while the relevant portions of the Social Security Claims Manual may be found in

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1/ (cont'd) to inform beneficiaries they have a right to request both reconsideration and waiver pursuant to § 204(b), and that it failed to mention the forms needed to request either type of review. Id. at 1223, text and n. 4. This conscious choice of the Secretary to attempt to keep recipients ignorant of their statutory rights to waiver is a very telling example of the Secretary's complete disdain for the dictates of § 204(b).

the petition at 119A-145A.[2/]

STATEMENT OF THE CASE

These consolidated cases were brought by Respondents, all of whom are recipients of benefits under Title II of the Social Security Act of 1935 as either "survivors" or "aged" or "disabled persons" to challenge on due process grounds the constitutionality of the procedures used by the Secretary of the Social Security Administration (the "Secretary") to recoup [3/] alleged overpayments.

At the heart of the case is the Secretary's misreading or disregard of the waiver provision of Section 204(b), which requires the Secretary to waive an overpayment whenever a recipient is without fault in causing the overpayment and recovery would either defeat the purposes of the act or be against equity and good conscience. The fundamental deficiency of the Secretary's challenged recoupment procedure is that it allows the Secretary to recoup overpayments without first determining eligibility for the waiver provisions of § 204(b).

The court of appeals modified the district courts' judgments by distinguishing, for due process purposes,

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2/ It should be noted that the regulations and claims manual were amended to comply with the orders of the lower courts in Buffington and Elliott. Consequently, portions of the overpayment procedure defended by the Secretary in his certiorari petition exist solely because of this lawsuit.

3/ The term "recoup" means to suspend or reduce current benefits to secure repayment of alleged past overpayment. The period of suspensic and the amount of reduction are unilaterally determined by the Secretary.

between "reconsideration" cases and "waiver" cases. In reconsideration cases the recipient challenges the existence and/or amount of the overpayment, while in waiver cases the recipient asserts his or her right to have the overpayment waived pursuant to § 204(b). The court concluded that prior oral hearings are not necessary in reconsideration cases unless the claimant raises an issue "in which the credibility of the claimant may be determinative of the outcome." Elliott, 564 F.2d at 1231. However, the court also ruled that § 204(b) waiver "determinations require an oral pre-recoupment hearing" (id. at 1235), unless "the claimant raises no disputed fact." (Id. at n. 21.) The court concluded that waiver determinations, which turn upon highly subjective, individualized factual determinations regarding the credibility, character, capacity and circumstances of the recipient, "cannot be properly administered without a (prior) oral hearing." (Id. at 1233.) 4/

Respondents certainly take exception to the Secretary's rather fanciful and inaccurate description of the challenged overpayment procedures. Fortunately, the records

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4/ The Secretary had unsuccessfully attempted to persuade the court of appeals that by seeking waiver, a recipient abandons his or her property interest in the benefits and thereby forfeits all due process guarantees. Totally disregarding § 204(b), the Secretary then argued that waiver became a matter of "governmental beneficence." Calling this argument "untenable", the court ruled that § 204(b) created a property right in the retention of alleged overpayments which "commands due process protection." Id. at 1230, n. 15. The Secretary has tried a new, but equally untenable argument in the petition for certiorari. At 13-14 he argues that "the Constitution does not bar the Secretary from proceeding to collection ..." in waiver cases," (emphasis added), while failing to mention the clear and unambiguous statutory mandate of § 204(b).

and the findings of the courts below give a more accurate picture of how the challenged system operates.

For example, contrast the Secretary's assertion at 13 of his petition that "the beneficiary can discuss his case with local Social Security officials who are responsible for assisting him in providing all the information necessary to evaluate his case," with the district court's finding that even though all the recipients in Elliott timely contacted their Social Security offices, "none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to investigate administrative action ..." and "the information and forms missing in the initial notice are not generally made available when the claimant consults his local administration office." 371 F. Supp. at 966.

Then compare the Secretary's suggestion, also at 13, that "these procedures adequately protect the beneficiary's interest in avoiding improper reduction of payments," with the Court's findings that recoupment was completed against several of the recipients in Elliott, including Mrs. Yamasaki, and that recoupment was not halted against Mrs. Biner in Buffington, despite the fact that she submitted a request for waiver and two separate requests for reconsideration. 564 F.2d at 1224-1225.

The Secretary also claims that the "beneficiary thus knows the basis for the Secretary's proposed action and may present objections to that action before it is taken." Petition at 13. However, as the court of appeals declared regarding the inadequacy of the notice:

> Like the district court in Elliott we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of 'processing error.' The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

Elliott, 564 F.2d at 1236, n. 22. 5/

The lower courts also found that the "opportunity to present objections" defended by the Secretary is often illusory given the age, physical capacity and/or educational background of large numbers of the recipients. See, e.g. Elliott, 564 F.2d 1233, text and n. 19. As Judge King observed:

> When reconsideration or waiver consideration is requested, the Administration's decision is based upon a claimant's ex parte presentation of documentary evidence on an issue which he may understand only nebulously. Many of these claimants are elderly and disabled people whose capacities may frustrate an effective documentary presentation of their case.

Respondents submit that the following presents a more accurate description of the challenged overpayment procedures. First, the Secretary would unilaterally determine that an overpayment had occurred and would then commence recoupment by reducing or suspending future monthly benefits. However, a recipient was usually first sent a form letter which contained an abbreviated statement of the reason for the overpayment, the availability of reconsideration, and waiver and the need to contact the Administration within

5/ For example, it is doubtful that Mrs. Yamasaki found "processing error" much help in understanding the nature of her alleged overpayment. Elliott, 371 F. Supp. at 966.

thirty (30) days if he or she wished to complain about the proposed recoupment. The reconsideration afforded was based on the written submission of the recipient. An oral evidentiary hearing occurred only after the recoupment had commenced. Moreover, such hearings generally were not held until months later and recoupment was not stayed during that time. If the request for reconsideration or waiver was rejected, recoupment would then begin, if it had not already been initiated. Only then did the beneficiary become entitled to an oral evidentiary hearing, but the recoupment continued until the overpayment was recovered or a favorable decision was rendered. The only interim relief available to the recipient was in the Secretary's absolute discretion to grant partial adjustment of the announced recoupment rate in limited cases and only if the beneficiary sufficiently demonstrated that such recoupment would work a financial hardship.

PROCEEDINGS BELOW AND PRESENT POSTURE OF THE CASE

The proceedings below and the present posture of this case are accurately set forth in the Secretary's petition at 5-10, 19-21. Because all requests for stays were denied, the Secretary has been holding pre-recoupment hearings since January, 1977. Petition at 10, n. 4, and at 19-21.

REASONS FOR DENYING THE PETITION

After remand by this Court, 425 U.S. 987 (1976), the court of appeals thoroughly examined the Secretary's procedures for recouping social security benefits due to an

alleged overpayment. It then correctly ruled that in light of the unique interest Congress created by enacting Section 204 of the Social Security Act and in view of the highly subjective and individualized factual inquiries required both under § 204 and the Secretary's regulations, due process required the Secretary to provide this limited class of social security recipients with an opportunity for an oral pre-recoupment hearing. For the reasons stated herein, this decision of the court of appeals is a proper balancing, under this Court's decision in Mathews v. Eldridge, 424 U.S. 319 (1976), of the applicable private and governmental interests.

This response to the Secretary's petition for certiorari shows that the petition should be denied since it fails to establish any grounds for this Court to exercise its discretionary jurisdiction as required by this Court's rules, see Rule 19, in that (1) there is no conflict in the courts of appeals on this issue and/or (2) the court of appeals decision is entirely in harmony with applicable decisions of this Court.

A. THERE IS NO CONFLICT OF DECISIONS TO ENTITLE THE SECRETARY TO REVIEW

Denial of the petition at this time is proper because the Secretary has failed to show a "conflict with another circuit court of appeals on the same matter." Rule 19(b). The Secretary in his petition does not, and he cannot, show any conflict in the circuits on this issue.

In lieu of establishing the conflict required by this Court's rules for purposes of obtaining certiorari review, the Secretary relies on the fact that the court of appeals decision in this case affirmed the granting of

nationwide class relief which, somehow the Secretary claims, insulates the issues here from review by this Court.

This contention is clearly wrong for several reasons. On the one hand, the class definition in this case specifically excludes persons involved in on-going litigation on the same issue, see e.g. Mattern v. Mathews, 427 F. Supp. 1318 (1977), appeal pending Civil No. 77-1629 (3d Cir. 1977). On the other hand, on this point the petition argues against itself: since the Secretary can establish no present conflict as required, the petition should be denied at this time and the Secretary should seek review of the decision in Mattern v. Mathews, if it is contrary to the decision of the court of appeals here. Indeed, the Third Circuit Court of Appeals will soon decide the Mattern case and only if there is a conflict in appellate decisions at that time would review by certiorari be appropriate. If anything, the petition not only establishes no required conflict of decisional law, but it also shows that its filing is premature.

B. THE COURT OF APPEALS DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The court of appeals, after thoroughly examining the Secretary's recoupment procedures, concluded that those procedures were unreliable, unfair, and illegal. In so deciding, the court of appeals was careful to limit its ruling to only those social security recipients, whom Congress intended, by enacting Section 204 of the Social Security Act, clearly to protect. Indeed, the court of appeals specifically emphasized that but for the mandate of Section 204 and its "waiver" inquiry, which is not present under any other provision of the social security program, the court would not have determined that an opportunity for an

oral pre-recoupment hearing is constitutionally required. In short, contrary to the Secretary's assertion, Petition at 11, the court of appeals did not extend prior rulings of this court; it merely applied those prior decisions to this unique statutory scheme.

In the face of such a ruling, the Secretary argues that this court of appeals decision is "inconsistent with the analysis of Eldridge." Petition at 11. Such a contention is patently wrong. In Eldridge, this Court ruled that the Secretary's procedures for terminating disability recipients under Title II of the Social Security Act were constitutionally valid even though the Secretary did not provide for an oral pretermination hearing. In so ruling, this Court articulated the three factors which must be considered in analyzing the dictates of due process -- they are:

> . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

After analyzing the Secretary's procedures in light of these factors, this Court determined that those procedures were minimally acceptable because of their "very elaborate" character; the "routine, standard, and unbiased" nature of the reports on which the termination decision was based, and the significant governmental burden to provide pretermination disability hearings.

Adhering strictly to this three prong Eldridge analysis, the court of appeals here properly balanced the competing governmental and private interests and determined that the Secretary's recoupment procedures were fatally flawed.

1. One of the factors of the Eldridge analysis is a balancing of the public interest at stake in recoupment decisions, including the function involved and the fiscal burden that those additional safeguards entail. For several key reasons upon applying the Eldridge public interest analysis to the case at bar, it is clear that it is in the public's interest for the Secretary to provide prerecoupment oral hearings. First, unlike Eldridge, in this case there is the strong, unqualified congressional mandate of § 204(b) to protect needy, innocent recipients, like Respondents in this case. That section provides, in pertinent part, that:

> . . . there shall be no adjustment or payment to, or recovery by the United States from any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Originally enacted in 1939 to "make more equitable recovery by the federal government other than correct payments to individuals," H.R. Rep. No. 728, 76th Congress, 1st Session (1939), § 204 was amended in 1967 to broaden the waiver of adjustment or recovery to include persons who are without "fault" and unable to repay. See H.R. Rep. No. 544, 90th Cong., 1st Sess. 2, reprinted in U.S. Code Cong. & Ad. News, 1967, at 3095. The legislative history accompanying this amendment makes it absolutely clear that Congress intended to grant these persons a right to the overpaid money unless the government can show that they were at fault and/or

could not repay that money. Id. at 3096.

In implementing this congressional mandate, the Secretary has promulgated regulations which further define such crucial statutory terms as "fault," "defeat the purpose of the Social Security Act," and "against equity and good conscience." See, e.g., 20 C.F.R. §§ 404.507, 404.508 and 404.509 (1977). Those regulations require the Secretary, in making the decision on whether to waive an overpayment, to weigh very subjective, highly individualized factors such as the recipient's age, intelligence, education, and physical and mental conditions, in addition to "all (other) pertinent circumstances." 20 C.F.R. § 404.507. Additionally, these regulations require an inquiry into the recipient's financial situation, i.e., his/her ability to repay the debt, 20 C.F.R. § 404.508. Thus, unlike the Eldridge procedures and the public interest balanced there, in the instant case Congress has expressed the strong opinion that in certain specified circumstances, the Secretary shall not recoup unless he provides recipients with the proper protections to assess their individualized factors. No such expression of public interest was present in Eldridge.

Another important difference of public interest here is that there is no reason to assume that there would be significant increase in the number of hearing requests, or that the Secretary has a strong fiscal interest in not providing pre-recoupment oral hearings. While the Secretary's recently disclosed statistics presented in his petition are irrelevant to show the reliability of his challenged procedures, they are very helpful in demonstrating the minimal administrative burden imposed by the injunctions in

this case. Indeed, the Secretary's statistics show an insignificant $100,000 per year cost to provide all the relief sought by Respondents.

In an attempt to inflate this $100,000 figure, the Secretary alleges several, other administrative burdens and "indirect" costs which he claims will result in great cost by complying with the decision of the court of appeals. These extra "indirect" costs are either inflated, erroneous, or highly speculative.[6/] First, the Secretary claims that the $100,000 figure does not include "losses incurred because of inability to recoup overpayments after a prolonged pre-recoupment period." Petition at 21. This is a highly speculative cost, if it exists at all, because, as the facts of the recipients show, the Secretary is entirely secure as to recovering costs. In the vast majority of overpayment cases, since it is a not question of a continued eligibility but the timing of the recoupment, if any, there is virtually no chance that an ineligible person will be paid during the waiver hearing process. Thus, the Secretary is secure regarding collection from these persons once it is determined that he has the right to collect at all.

Moreover, the Secretary seeks to claim as indirect costs, the monies allegedly overpaid to the recipients and the interest, if any, on that money. This is certainly erroneous because these are funds which Congress intended to be waived and, thus, would be at issue even under the

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6/ Indeed, this Court should be very wary of such cost estimates by the Secretary in light of astounding variance between the $100,000 figure offered in this petition and the artificial cost estimate of $15-40,000,000 which the Secretary claimed before the court of appeals. See Appendix E herein.

challenged procedures. Also, the Secretary asserts that there is an "indirect" cost for the diversion of resources, which could be used by the Social Security Administration, not for pre-recoupment hearing but for other, unspecified needs. Petition at 21. The Secretary's statistics belie this contention. The court-ordered safeguards in Elliott have improved the decision-making by reducing the error rate by approximately 25%. That is, 25% fewer errors are being made under the present system than under the previous one. This is borne out by the Secretary's own statistics at page 21 which show a 50% reversal rate at the waiver determination stage now as opposed to the nearly 75% rate which Judge King found in Elliott. 371 F. Supp. at 967.

Furthermore, not only is the dollar cost to comply with the court of appeals decision negligible but also the numbers of hearings requested are very modest. Again, using he Secretary's belated statistics in its petition, he shows only 1,200 personal conferences, i.e. oral pre-recoupment hearings, requested during the calendar year 1977. Petition at 21. Not only is this a very small number of hearings, but the Secretary ignores the fact that these hearings would be held even under the challenged procedures, so surely they cannot fairly be labeled an additional cost.

Like Goldberg, and unlike Eldridge, such a pre-recoupment waiver hearing is invaluable for the decision-maker to confront the recipient in order to assess his/her culpability, needs and credibility. This can be accomplished readily by the type of procedure presently employed by the Secretary, a short personal conference with an impartial employee of the Social Security Administration at which time

the recipient presents testimony and evidence and the administrative employee questions the recipient. Such a procedure is the same one successfully and effectively now employed by many administrative agencies to determine for example, eligibility for welfare, unemployment compensation and food stamps. The administrative costs, both in terms of money and personnel, are small, while the administrative gain, in terms of reliability and efficiency in decision-making is great.

For these reasons, it is clear that the public interest will be well served by requiring the Secretary to conduct pre-recoupment oral hearings. The importance of the minimal fiscal impact on the Social Security Administration, coupled with the insubstantial inconvenience to the Secretary's existing bureaucracy pales when compared to the often devastating impact the present procedures have on large numbers of recipients who have suffered or will suffer from recoupment pending the waiver determination.

2. The court of appeals also properly evaluated the risk of erroneous deprivations under the Secretary's challenged recoupment procedures and correctly determined that an opportunity for an oral pre-recoupment hearing was vital. Contrary to the Secretary's petition, this conclusion is entirely in harmony with the Eldridge decision.

In Eldridge, this Court reviewed procedures in which the Secretary made an initial determination of eligibility after that determination had been previously reviewed by a separate state agency and based solely on reports which were "routine, standard, and unbiased." Here, the decision-making process and the information used in that process is significantly different. The Secretary makes an ex parte

determination of an alleged overpayment but this is not the issue to be reviewed at a pre-recoupment hearing. Rather, at the hearing, the recipient seeks an initial ruling on whether the overpayment should be waived pursuant to § 204(b). Unlike Eldridge when the beneficiary was involved in the decision-making process from the outset on the issue which was critical to that beneficiary, (i.e., whether he/she was "disabled"), here the Secretary makes no initial waiver decisions until he receives the respondent's individualized input about "fault" and "ability to repay." This process under § 204(b) is a recognition that the recipient's input is a necessary predicate for a proper waiver decision.

Furthermore, again unlike Eldridge, the waiver question requires the assessment of fundamentally different evidence and the application of highly subjective legal standards. In order to make a waiver determination, the decision-maker must analyze and weigh the very individualized and personalized evidence which is determinative of whether a recipient is "at fault" in causing the overpayment and whether he/she is able to repay.[7/] It is uncontestable that this "fault" determination requires an oral hearing at which the decision-maker can confront the recipient and is able to gauge his/her credibility. For example, such a proceeding would have been invaluable for Mrs. Yamasaki since the Secretary had determined that she owed $207.90 and the

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7/ The subjective nature of the inquiry is exemplified by the fact that under the Secretary's regulations, a recipient may still be at fault "even though the Secretary may have been at fault in making the overpayment," 20 C.F.R. § 404.507(c), or if he/she "knew or should have known" an overpayment would occur from his/her receipt of excess benefits. This is contrary to the Secretary's bald and unsupportable assertion that waiver questions are simply more "diffuse." Petition at 18.

stated reason was that it was due to the Secretary's "processing error." The only fair means for the Secretary to evaluate whether Mrs. Yamasaki "knew or should have known or could be expected to know," 20 C.F.R. § 404.507, about the incorrect payment is through an oral hearing at which he/she is questioned and testifies. [8/]

Similarly, once the thorny credibility-based "fault" issue is resolved, the Secretary then must determine whether it would be "against equity and good conscience" or "defeat the purposes of (Title II)." This evaluation, as detailed by the Secretary's regulations, 20 C.F.R. §§ 404.508 and 509, requires an in-depth analysis primarily of the recipient's financial need; the state of the recipient's knowledge about his entitlement to the overpayment monies; and a factual/credibility determination of whether the recipient detrimentally relied on receipt of the overpayment. Again, this is

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8/ Indeed, the importance of the pre-recoupment oral hearings in this context was specifically noted by the court of appeals as follows:

> While the Administration conceded that Mrs. Biner may not have been at fault in receiving the overpayment checks in 1972, it nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was "without fault" within the meaning of the Social Security Act. However, whether Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. Finding fault on the basis of the ambiguous letter enclosed with the first overpayment check sent her, without giving her an opportunity to explain in person what she thought it meant, is simply inadequate. 564 F.2d 1219.

clearly the type of evidence which goes far beyond the "routine, standard" medical reports at issue in Eldridge. Because of these critical differences in the evidentiary and legal standards, the court of appeals properly ruled that the Secretary's recoupment procedures were illegal.

Another relevant factor under the Eldridge analysis is the relative reliability of the existing procedure. In assessing the value of statistics in Eldridge, this Court stated that "statistics rarely provide a satisfactory measure of the fairness of the decision-making process." Eldridge at 346. A further caution is necessary since the Secretary belatedly offers statistics in his petition which were not presented to the court of appeals. Clearly, the proper yardstick under Eldridge is not the reliability of court-ordered changes. Consequently, the Secretary's proferred statistics, at pages 19-20 of the Petition, are an invalid measure of the relative reliability of his challenged procedures because those statistics are based on his experience under the improved, court-ordered procedures. For the purposes offered by the Secretary, his belated statistics should be ignored.

Before the court of appeals, the Secretary claimed, as he does here, that because there was a low "overall" number of recipients who had obtained successful relief, the procedures were reliable. Petition at 14-20. However, the Secretary wrongly draws from the entire overpayment population and not from those who actually sought waiver. Since the Secretary makes no waiver determination until asked by the recipient and since § 204 grants the rights of waiver to every overpaid recipient, this distinction is crucial and it shows the unacceptably high error rate prior to the decisions

in this case. That is, there is almost a 75% error in the pre-Elliott procedures.[9/] This is a far more staggering error rate than was presented in Eldridge where this Court found that disability termination procedures produced between a 3.3% and 12.2% error rate. 424 U.S. at 346, n. 19b. In light of these statistics, it is evident that the Secretary's challenged procedures allowed him to reduce or suspend social security payments when, in view of Section 204(b), he absolutely has no right to do so. Nothing in Eldridge alters the conclusion that the Secretary's procedures are highly unreliable and it is only through pre-recoupment oral hearings that proper safeguards will be provided.

3. Finally, regarding the respective interests at stake here, the court of appeals properly rejected the same contentions that the Secretary asserts in his petition, i.e., that the private interest here is not as significant as that in Eldridge. Petition at 15. The facts, as found by all of the courts below, and the Secretary's practice belie this

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9/ Specifically, Judge King, in Elliott, found that in 1970 (the latest figures available at that time) the reversal rate was over 73%. That is, of the estimated 12,000 requests for reconsideration and waiver, over 8,000 finally succeeded in obtaining full relief. 371 F. Supp. at 967. Also, in light of the actual findings by all of the lower courts, it is very likely that this group would be larger if the Secretary adequately informed recipients of their rights to waiver and reconsideration (the Secretary's form notice was found to be constitutionally invalid) and if the Secretary facilitated filing for reconsideration and waiver (recipients were not provided with waiver and reconsideration forms and even when submitted, they did not toll recoupment). Given the inadequacies of the Secretary's notice and the difficulties for recipients to initiate the reconsideration/waiver process, these figures are very dramatic, for undoubtedly these failures of the system discouraged or thwarted many recipients from exercising their right to waiver.

claim. It is undisputed in the record that it is the Secretary's regular practice to suspend benefits entirely, and only later make "partial adjustments" described at page 15 of the Petition. While the length of the period of suspension varies with the amount of the alleged overpayment and the recipient's monthly entitlement, there can be no question that these suspensions of benefits had devasting effects on each of the named recipients in this case. For example, Mr. Jordan Silva sought welfare assistance from the State of Hawaii because he and his wife could not meet their minimum subsistence needs. Predictably, because of the very restrictive eligibility standards for state welfare assistance, the Silvas were denied any financial help. Of the plight of such persons directly subjected to the Secretary's recoupment procedures, the district court stated that these recipients were in "brutal need" in the Goldberg v. Kelly, 397 U.S. 254 (1970), sense because:

> Starvation may be slower if benefits are reduced or suspended rather than terminated in Goldberg, but some recipients will suffer nonetheless. 371 F. Supp. at 970.

Moreover, the Secretary is equally incorrect in stating that financial need is irrelevant here. Financial need is central to the waiver question and to the issue of continued eligibility for either retirement or survivor's benefits. For example, as the court of appeals found, retired social security recipients are "taxed" for each dollar they earn above the statutory maximum. This "tax," the appellate court found, was very "similar to that found in many welfare programs," See generally 42 U.S.C. §§ 402(a)(7) and (8) (1977). In establishing financial need as an essential inquiry in the waiver determination under Section 204

and an important factor in continued eligibility of retirees and survivors, Congress treated respondents more like the welfare recipients in Goldberg rather than the beneficiaries of the pure insurance program at issue in Eldridge. Thus, the court of appeals correctly decided that respondents private interests under § 204(b) are greater than those scrutinized in Eldridge.

4. The court of appeals found that this case was appropriate case for the exercise of mandamus jurisdiction, for the named recipients and the unnamed class members. In his petition the Secretary disagrees, of course, relying on the recent decision in Califano v. Sanders, 430 U.S. 99 (1977). Petition at 23. However, the court of appeals correctly rejected the Secretary's reliance on Sanders, noting that the issue of the propriety of mandamus jurisdiction was not decided by this Court in that case.[10/]

Apparently, the Secretary does not dispute the court of appeals' conclusion that Elliott was a "traditional" due process case in that respondents were asking the court to require the Secretary to perform a purely ministerial (albeit constitutionally mandated) duty. Rather, the Secretary argues that 42 U.S.C. § 205(h) and (g) preclude mandamus

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10/ As the Elliott court observed, 564 F. 2d. at 1226-1227, the question of § 1361 jurisdiction was not before the Court in Califano, and it had been specifically left open even after argument in Eldridge, 424 U.S. at 332, n. 12. Furthermore, in the very next sentence in Califano this Court stated:

> Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extra-ordinary' step of foreclosing jurisdiction unless Congress intent to do so is manifested by 'clear and convincing' evidence. (Citation omitted.)

jurisdiction over any social security issue, including respondents' due process claims at issue here. Petition at 22-24.

Respondents submit that the Secretary's argument overlooks the critical distinction made by the court of appeals between this case and this Court's decision in Weinberger v. Salfi, 422 U.S. 749 (1975). As the Court there noted:

> The instant suits are quite different ... They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the Courts. 564 F.2d at 1226.[11/]

The Secretary can cite no other cases which support his mandamus jurisdiction argument. In fact, the courts of appeals have unanimously agreed that mandamus jurisdiction is available in cases like Elliott in which constitutional questions, rather than claims for benefits, are at issue. Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975) and De Lao v. Califano, 560 F.2d 1384 (9th Cir. 1977); and White v. Mathews, 559 F.2d 852 (2nd. Cir. 1977) cert. denied sub nom, Califano v. White, 46 U.S.L.W. 3541 (Feb. 28, 1978)

11/ The court also noted the absence of "any clear and convincing evidence that Congress intended to limit mandamus jurisdiction at all by § 205(h)," Elliott, 564 F. 2d. at 1227. The court's conclusion was premised in part on the fact that § 1361 did not exist when § 205(h) was enacted. Id. at 1227, n. 12. Moreover, the court's suggestion that "Congress intended all further additions to Title 28's grants of jurisdiction to be, by the mere statutory location of those additions, subsumed within the prescription of § 205(h)," (Ibid.), is rebutted by the uncodified legislation which declared that, "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 ... in which any section is placed ...." Judiciary and Judicial Procedure Act of 1948, Pub. L. 773, § 33, 625 Stat. 991 (1948).

Moreover, the sole case cited in the petition is entirely consistent with the foregoing decisional law. In Association of American Medical Colleges v. Califano, 569 F.2d 101 (D.C. Cir. 1977), relied on by the Secretary, Petition at 23, the court expressly recognized the "procedural-claim for benefits" distinction, noting that: "We realize that mandamus may become available in limited circumstances not involved here," and then cited Elliott and White v. Mathews with approval. Id. at 113.

5. Furthermore, respondents submit that regardless of the availability of mandamus jurisdiction, § 205(g), 42 U.S.C. § 205(g) (1977) provides jurisdiction for both the named recipients and the unnamed class members. While the Secre- tary concedes that the named respondents satisfied the 42 U.S.C. § 205(g) jurisdictional test announced by this court in Mathews v. Eldridge, 424 U.S. 319 (1976)[12/] he still argues that the lower courts lacked § 205(g) jurisdiction over the unnamed class members. Petition at 23. Although the court of appeals did not specifically address this issue, Elliott, 564 F.2d at 1225-26, n. 8a., respondents submit that class-wide jurisdiction does exist

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12/ In Eldridge this Court explained that the jurisdictional test under § 205(g) has two components, one of which is waivable, the other not. The non-waivable element is the requirement that a claim for benefits shall have been presented to the Secretary for decision. In the instant case the Secretary concedes that the named plaintiffs satisfied this element by filing "claims seeking to avoid recoupment," Petition at 23, but argues that some of the class members had not filed such claims, thus making 205(g) unavailable and class certification unappropriate.

The waivable element is the requirement that all administrative remedies be exhausted. Under appropriate cir cumstances the exhaustion requirement may be waived by the Secretary or deemed waived by the courts. Apparently the Secretary agrees that it is appropriate to waive exhaustion here, for the plaintiffs present "a colorful constitutional claim entirely collateral to the merits of the statutory entitlement to benefits," Petition at 23.

under § 205(g), and that these actions should properly be certified as class actions under that section.

Contrary to the Secretary's contentions, class certification in this case would not be inconsistent with the jurisdictional requirements set forth in Salfi and Eldridge for several reasons. Most importantly, the case does not involve a claim to entitlement or continued entitlement to benefits. All the class members have successfully submitted claims for entitlement. If they had not, they would not now be the subject of the Secretary's overpayment recoupment efforts. Moreover, their continued entitlement to benefits is not at issue in an overpayment proceeding, a proceeding entirely collateral to establishing claims for entitlement.

To require the class members to submit additional claims seeking to avoid recoupment, as urged by the Secretary, would be to require entirely superfluous acts. As this Court noted, the underlying purpose served by requiring the filing of a claim for entitlement is to allow "the Secretary the opportunity, prior to constitutional litigation, to ascertain ... that the particular claims involved are neither invalid for other reasons nor allowable under the other provisions of the Social Security Act." Salfi, supra, at 762. Here, there are no "other reasons" or "other provisions" available to the Secretary in the overpayment recoupment process, where the only possible issues are whether an overpayment occurred, the amount of such overpayment, and the recipient's eligibility for waiver.

Secondly, this case is distinguishable from Eldridge in that the class members here did not receive adequate

notice about the nature and availability of the reconsideration and waiver procedure. Under the circumstances, it would be fundamentally unfair to rule that § 205(g) jurisdiction does not exist for those recipients who failed to exhaust their administrative remedies, since the failure to exhaust was often due to the inadequacy of the Secretary's notice procedure.[13/]

6. The Secretary also wrongly claims that § 205(g) precludes the grant of injunctive relief to individuals as well as classes. The same argument was raised but not ruled on in Norton v. Mathews, 427 U.S. 524 (1976). Here the court of appeals also questioned but did not rule on this issue. Elliott, 564 F. 2d at 1225-1226, n. 8A. However, the three appellate courts which have ruled on the issue have all specifically rejected the Secretary's argument. Jimenez v. Weinberger, supra, at 694-695; Johnson v. Mathews, supra, at 1125; and In Re Letourneau, 559 F.2d 892 (2d Cir. 1977).

Respondents submit that these decisions are consistent with both long-standing decisional law and common sense. Under the Secretary's theory, it would be impossible

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13/ The court of appeals also properly rejected the Secretary's argument that this Court's decision in Salfi required a reversal of the class certification. In so doing, the court first noted that since the class included only those who had been denied because of the challenged section of the Act, it excluded those "whose applications could have been or were rejected for other reasons as well." 564 F. 2d at 1226-27.

Here, respondents' class is defined as consisting only of all those who have been denied solely because of the challenged practice of the Secretary. Accordingly, there is no possibility that any of the unnamed class members "could have been or were rejected for other reasons as well." Jimenez, 523 F. 2d. at 695, n. 10. These recipients have claims which require no further agency action for their resolution, and, consequently it is proper to waive the § 205(g) exhaustion requirement for all the class members, and to conclude that this class should include all those who are subject to the Secretary's challenged overpayment recoupment practice.

to certify a class action to review his overpayment recoupment procedures. The ultimate folly of this argument should be readily apparent in view of the nearly 1,250,000 overpayments per year which the Secretary claims he processes. As the court of appeals correctly observed:

> It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. Multiplicity of actions based on the same constitutional claims advanced here would inevitably result.
>
> Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper, but it also will effectuate the interests both of judicial administration and of justice. 564 F.2d 1229-30.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

STANLEY E. LEVIN
JEFF SPENCE
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June 21, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 1978, I served the foregoing RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT for the Respondents by causing copies to be mailed, airmail, postage pre-paid, to:

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WITH THE EXCEPTION OF THE FOLLOWING APPENDIX E, ALL DOCUMENTS ATTACHED TO THIS OPPOSITION WERE REPRINTED IN MORE LEGIBLE FORM IN THE APPENDIX VOLUME AND HAVE THEREFORE NOT BEEN REPRODUCED HERE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-3118
(consolidated with
No. 74-1611)

FANNIE BUFFINGTON and FRANCES BINER,
Individually and on behalf of all
others similarly situated,

Plaintiffs-Appellees,

v.

CASPAR W. WEINBERGER, Individually
and in his capacity as Secretary
of the Department of Health,
Education and Welfare,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE APPELLANT

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1. At the outset, we call to the Court's attention the following developments which have occurred since the filing of the main briefs in this case.

a. The Supreme Court, on January 13, 1975, has granted the government's petition for certiorari in Eldridge v. Weinberger, No. 74-204. In Eldridge, the Court of Appeals

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APPENDIX E

for the Fourth Circuit held that the Secretary's pre-termination procedures in social security cases were unconstitutional insofar as they failed to afford claimants a pre-termination oral hearing.

b. A panel of the Court of Appeals for this Circuit, on January 2, 1975, held in Knuckles v. Weinberger, No. 73-3207, that the mandamus statute, 28 U.S.C. 1361, conferred jurisdiction on the district courts to entertain cases of this type. The government is currently considering whether to seek rehearing in that case, and we will advise the Court of the government's position in this respect at oral argument.

c. The Secretary has filed an application in the Supreme Court for a stay of the district court's nationwide class order pending this appeal. Mr. Justice Douglas has requested a response from the plaintiffs to the Secretary's application.

2. The central issue in the present case is as follows: whether a full oral hearing must be routinely afforded in the more than one million overpayment cases arising each year under the social security program.[1/] The immense administrative burden resulting from such a requirement, and the attendant drain upon the trust fund following upon its implementation, is the inevitable consequence if the

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1/ In 1970 alone, there were over one million overpayment cases. (Elliott Record, p. 530.)

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district court's decision is affirmed.[2] For there can be no doubt that pre-recoupment oral hearings in vast numbers will be demanded by overpaid beneficiaries, since the prospect of such a prior hearing will necessarily delay recoupment that much longer.

On the other hand, as we have shown in our main brief, plaintiffs have wholly failed to demonstrate that such an extraordinary and costly expansion of the Secretary's procedures is justified. There is no reason whatsoever to routinely furnish pre-recoupment oral hearings in "reconsideration" cases, i.e., where the issue involves the correctness of the overpayment determination. The issues involved in such cases are easily resolved by documentary means. As to waiver cases, we have shown that there is no constitutional right to a prior hearing when the claimant asks the Secretary to forgive a conceded debt. Moreover, notwithstanding plaintiff's strenuous assertions to the contrary, the issues in waiver cases frequently require no oral hearing. Thus, in plaintiff Biner's case, she received and cashed over $2,000 in benefit checks for 1972 - monies to which she

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2/ The Secretary estimates that the initial cost of establishing the expanded system would be approximately $15 million. To maintain the system on a permanent basis could result in "an ongoing cost of up to $73 million per annum". Further losses due to uncollectible debts will increase the program's current annual loss of over $11 million. (December 12, 1974, Affidavit of James E. Forbus, Deputy Director, Bureau of Retirement and Survivors Insurance of the Social Security Administration, filed in connection with the Secretary's application in the Supreme Court for a stay of the district court's order pending the instant appeal.) A copy of that affidavit is reproduced as an addendum infra.

was not entitled because of her employment throughout that year. No oral hearing was required to establish Mrs. Biner's "fault" in retaining these funds - the matter is crystal clear. Indeed, the administrative law judge, when the case did go to an oral hearing, sustained the Secretary's initial determination that Mrs. Biner was at fault in failing to return these checks to the government.

We stress further that the very statistics relied upon by plaintiffs in their brief (Br. pp. 31-32) amply demonstrate the sufficiency of the Secretary's existing procedures in resolving waiver controversies. Thus, in 1972, the Secretary granted nearly 50 percent of the waiver requests submitted to him in documentary form.[3] Moreover, in 1970, over three-fourths of all pre-recoupment claims submitted to the Secretary were granted. (Elliott record, p. 530). In view of these circumstances, it is absurd to contend that the Secretary's procedures are not fundamentally fair. These considerations alone demonstrate that the challenged procedures are fully adequate to deal fairly and responsibly with waiver claims having a reasonable basis in fact. Doubtless, there are some valid waiver disputes remaining which are denied at the pre-recoupment stage, and are ultimately vindicated at a subsequent oral hearing. But the question at bar is whether, by reason of some meritorious cases, the social

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3/ Of a total of 41,221 claims of waiver, 20,841 were found to be without fault (R. 154).

security trust and is to be required to bear the cost of providing oral hearings in every overpayment case prior to recoupment. When the number of such cases exceeds one million annually, the Secretary's decision to begin recoupment at the conclusion of the documentary stage is hardly unreasonable. Finally, we would note that the Secretary's pre-recoupment system contains the additional safeguard of preventing financial hardship by reducing the amount withheld to conform to the claimant's financial circumstances (thus, pursuant to plaintiff Biner's request, only $50 a month was deducted from her benefit check). We do not have, therefore, the drastic consequences which would ensue if all benefits were suddenly terminated (compare Goldberg v. Kelly, where the welfare claimants were abruptly deprived of all public assistance at the pre-termination stage).

There is no merit to plaintiffs' contention (Br. pp. 8-14) that 42 U.S.C. 404(a) and (b) forbid a preliminary adjustment pending an oral hearing. Those statutory provisions require the Secretary to recover overpayments after he "finds" that an overpayment has been made. The statute also provides that "there shall be no adjustment of payments" against a claimant "who is without fault . . . ." Plaintiffs are plainly wrong in asserting that the Secretary has not made the findings prescribed by the statute. The findings have been made, but are subject to review after a hearing if the claimant appeals, as is true under various administrative

schemes. See e.g., Arnett v. Kennedy, 416 U.S. 134 (1974), Crow v. California Dept. of Human Resources, 490 F. 2d 580 (C.A. 9, 1973),[4/] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Plaintiffs erroneously maintain that Congress intended, by these statutory provisions, to forbid non-final recoupments pending an oral hearing. But the statute, of course, says no such thing; there is no reference whatsoever to the procedures to be followed in recoupment cases (see Mills v. Richardson, 464 F. 2d 995, 1001 (C.A. 2, 1972)). We hardly think that Congress, in the absence of an express declaration to the effect, intended to prevent the preliminary withholding of federal funds when, as here, the circumstances plainly justify it. All that Congress could have intended by the provisions relied upon by plaintiffs is that the Secretary, in implementing the statute, establish procedures which comport with the Constitution. Mills v. Richardson, supra. The Secretary has met that requirement here.

Accordingly, the Secretary's procedures amply satisfy due process, and the judgment of the district court should be reversed.

4/ A petition for certiorari is pending before the Supreme Court in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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JANUARY 1975.

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I hereby certify that on this 16th day of January, 1975, I served the foregoing Reply Brief for the Appellant by causing copies to be mailed, air mail, postage prepaid, to:

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